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IN THE

Supreme Court of the United States

October Term 1971

No. 71-854

THE DEUTSCH COMPANY, METAL COMPONENTS DIVISION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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THE DEUTSCH COMPANY, METAL COMPONENTS DIVISION,

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on June 24, 1971, petition for rehearing denied on October 8, 1971.

Opinion Below.

The opinion of the Court of Appeals is reported at 445 F.2d 902 (C.A.9, 1971). Its decision grants enforcement of an order of the Respondent National Labor Relations Board finding that the Petitioner, an employing company, committed a *per se* violation of Section 8(a)(1) of the National Labor Relations Act, as amended, (hereinafter referred to as the "Act"), by informing its employees of their right to disavow union authorization cards, even though the communication was unaccompanied by any direct or indirect "threat

of reprisal or force or promise of benefit." The decisions of the Court below, the Board, and the Trial Examiner are appended hereto, along with the Order denying the Petition for Rehearing.

Jurisdiction.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Constitutional Provisions Involved.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const. Amendment I.

Statutes Involved.

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

Section 8(c) of the Labor Management Relations Act, 29 U.S.C. § 158(c).

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bar-

gaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Section 7 of the Labor Management Relations Act, 29 U.S.C. § 157.

"It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . ."

Section 8(a)(1) of the Labor Management Relations Act, 29 U.S.C. § 158(a)(1).

Questions Presented.

1. Did the Court below err in holding that the Petitioner, *as a matter of law,* does not have the right to inform its employees of their right to disavow union authorization cards, where the communication was unaccompanied by any direct or indirect threat of reprisal or force or promise of benefit?

2. Did the Court below err in holding that Petitioner could not engage in any expression that might "undermine employee support for the union" despite the conceded absence of threat of reprisal or force or promise of benefit?

3. Did the Court below err in admonishing employers that they must remain absolutely neutral during a union organizational desire?

Statement of the Case.

A. Background and Status of the Proceedings.

Petitioner is a company which during a union organizational drive received reports from employees of coercion and possible fraud perpetrated by union organizers. Petitioner by letters informed its employees that if authorization cards had been signed under coercion or had been forged they could be revoked. The Court below, exercising its jurisdiction pursuant to Section 10(e) of the Act, held the sending of these letters to be an unfair labor practice, as a matter of law, and declared the following caveat as the principle governing employer free speech: any employer who in any way voices an opinion which might discourage union affiliation has committed an unfair labor practice and no shelter against attack is to be found in free speech.

Commencing in February, 1968, the Marine and Shipbuilding Workers Union (hereinafter referred to as "the Union") commenced an organizational drive at Petitioner's plant at Los Angeles, California; the Union campaign continued uninterrupted for seven months. On May 13, the Union filed a representation petition and the hearing thereon was held on July 11. On July 25, the Regional Director directed the holding of an election on August 22, with 276 employees being eligible to vote. The election resulted in 167 votes against the Union and 54 votes for the Union. During the long campaign some employees became active union organizers. Authorization cards were passed out on company property, during lunch breaks, and before and after work. Organizational activity occurred during working time. Union organizers solicited Union mem-

berships at the homes of employees without invitation and remained despite the expressed desires of the employees that they leave. On several occasions, employees were harassed or coerced by Union organizers seeking authorization card signatures. Employees continually complained to the Petitioner of Union intimidation and threats, in attempts to obtain cards, which permeated the organizational drive.

On June 11, the Board issued its complaint charging the Petitioner with multiple and various unfair labor practices. From this multitude of charges, the Board found the Petitioner to have committed an unfair labor practice only in regard to the letters which are the subject of this Writ, and in an isolated "interrogation" which as admitted by the Board had no affect on the unionization drive and is not relevant herein.

B. The Petitioner Is Voluntarily Told by Employees of Union Tactics Used to Coerce Employees Into Signing Authorization Cards and of the Existence of Forged Cards. In Response Thereto, the Petitioner Mails Letters to Employees Informing Them of Their Right to Revoke Union Authorization Cards Unlawfully Obtained.

Throughout the course of the organizational drive, the Petitioner's Personnel Director, Peter Hanly, received from employees seeking aid unsolicited statements about forged authorization cards and coercive attempts by Union organizers to force employees into signing union authorization cards. The following information was communicated to Hanly by employees of Petitioner.

Employee Palacios told Hanly that he and employee Vasquez had squared off in the company parking lot and a fist fight was barely avoided when they were physically separated by Petitioner's foreman. When Hanly asked him what the flight was about, Palacios

told him that Vasquez had been harassing him for a long time in an effort to make him join the Union, and the act triggering the near fight was Vasquez calling him a "homosexual" in Spanish for not signing a Union card.

Some time in the middle of March, as Hanly was taking one of his routine strolls through the plant, employee Montoto stopped him and told him that Union organizers had come to his house to get him to sign a Union card. Montoto told the men several times that he did not want to sign the card, but they refused to leave.

Shortly thereafter, Montoto told Hanly that within a few days, he again was approached by a Union organizer who told him, "Don't be chicken, sign the card." Despite Montoto's previous reluctance, the organizer pressed Montoto by warning him that he was going to have to sign the card and, finally, that if he didn't sign, he wouldn't have a job.

Realizing that the acts reported to him represented only a small part of the Union's coercive activities, Hanly contacted the Petitioner's labor relations consultant to determine what could be done about the Union's intimidation. The consultant advised Hanly of what action could be lawfully taken to allow employees to disavow a wrongfully obtained signature.

As a result of Hanly's conversation with the consultant, the Petitioner mailed to its employees, on April 1, a letter which provided in pertinent part as follows:

> "If you have been misinformed or misled by the Union, or
>
> If you have been coerced, intimidated or threatened into signing an authorization card at your home or at the plant, or

If you think someone may have signed your name to a card,

You may revoke it by signing and mailing the enclosed postcard. This card will be kept in confidence by the National Labor Relations Board and the Company and the Union will not be told your names."

With the letter was a postcard addressed to the National Labor Relations Board which simply stated:

"Re: Deutsch Metal Components Division I hereby revoke my card authorizing the Shipbuilders Union to represent me.

.....

(Employee's Name)

.....

Date

Following the April 1 letter, employees continued to complain to Hanly of the activities of the Union organizers. For example:

Employee Resch told Hanly that as he was parking his car in the Petitioner's lot, Union organizer Diaz came up on the driver's side of Resch's automobile. Diaz stuck his head through the open window and began drumming his ring on the side of the car. Another Union organizer circled around to the other side of the car. Diaz asked Resch to sign a card and Resch advised him he did not want to sign one, to which statement Diaz retorted, "You had better sign a card." When Resch again refused, Diaz threatened that if he didn't sign a card, he had better not come to work. Resch immediately left the lot and drove around for fifteen minutes trying to determine what he should do. He finally called Hanly from a gas station, and Hanly

persuaded him to come back to work. When Resch returned, he backed into a parking space so that he could leave in a hurry if he had to. Resch told Hanly the same day that he didn't want any trouble, that he had been beaten up before, and that he didn't want to get beaten up again.

Employee Carrasco told Hanly that Union organizers had come uninvited to his house. When Carrasco asked them why they were there, they told him that they had received his Union authorization card in the mail. Carrasco dismayedly told them that he did not send in any Union authorization card, and did not understand how they could say that they had such a card.

The Petitioner's maintenance contractor, Armando De Castro, told Hanly that while his men were out cleaning machines during working time they were constantly harassed by Union organizers who wanted them to sign Union cards, and even after they refused the harassment would continue.

The Petitioner resisted any temptation to counteract the unlawful tactics of Union organizers by similar means and merely made a second mailing of the letter on May 20 which provides the basis for the finding of an unfair labor practice. The second letter provides in pertinent part as follows:

> "Remember, you have the right to be free of fear, coercion or threat and our company will always protect these rights.
>
> "If anyone threatens or intimidates you, either at work or at your home, in any way, please report it to me or Pete Hanly and we will take the necessary action to protect your freedom.

"For those of you who have signed a union authorization card because you either

1. were misinformed of your right not to sign a card if you so desired, or
2. were coerced and forced to sign a card, or
3. were intimidated or threatened with violence or loss of your job if the union got in, or
4. were told to sign a card to be a 'right guy' or
5. believe someone else signed your name to a card,

you can withdraw your authorization to the union by signing the enclosed de-authorization card and mailing it to the National Labor Relations Board.

"This card is being sent to you at your home so you can make your decision without fear, coercion, threat or promise of any kind. Discuss it with your family.

"In my opinion the relationship as it presently exists at Deutsch is much better than the promises being made by these union organizers which everyone knows will not be kept.

"To those of you who support my position and continue to do so, and have not signed a card—many thanks."

Reasons for Granting the Writ.

1. The issue before the Court is of crucial importance in labor-management relationships. Providing employees with information as to their rights, including the right to disavow Union affiliation, is a traditional and widespread practice. The *effect of the Court's holding below is to chill any communication with employees* which might discourage union support and, in effect, limits free speech protection, as expressed in Section 8(c) of the Act, to pro-union sentiments only.

2. The holding of the Court below is inconsistent with the decisions of all the other Circuits which have considered the pending issue and with all of the prior decisions of the Court below.

3. The decision of the Court below is inconsistent with the express directive of Section 8(c) of the Act because it holds that a communication advising employees of the right to disavow a union is unlawful despite the absence of any "threat of reprisal or force or promise of benefit" expressed in the communication or existing in the surrounding circumstances.

4. The Court below has shifted the traditional burden relating to free speech from requiring a prior justification for any restriction on free speech to insisting that in the case of an employer that he provide a justification for speaking even non-coercively to his employees before he may exercise his constitutional right of free speech.

5. This Court has not since the enactment of Section 8(c) of the Act ruled upon the question of an employer's right or obligation to inform employees of their rights under the Act and, more importantly, this Court has never clearly enunciated the scope of Section 8(c) of the Act or the rights thereunder. The need for guidance from this Court has since the passage of Section 8(c) in 1947 become critical as labor-management relations has become the principal forum for economic debate.

6. While this Court has not ruled upon the question posed by this petition, the holding of the Court below is violative of the spirit of free speech protection in the field of labor relations which has been expressed by this Court.

7. By adopting the Board's position that employers are barred from engaging in any dialogue with employees during an organizational drive, the Court below is allowing the Board to revert to its pre-1941 posture which was condemned by Congress in 1947 with the enactment of Section 8(c), which directed the Board to protect all employee expression unless accompanied by "threat of reprisal or force or promise of benefit."

DISCUSSION.

A. The Holding of the Court Below Ignores the Spirit of Free Debate Encouraged by the Act and Repudiates the Statutory Directive That Expressions Are Protected in the Absence of Coercion.

1. The Act Encourages Free and Open Debate Which May Only Be Curtailed if Containing a Threat of Reprisal or Force or a Promise of Benefit.

The Act seeks to extend to employees the right to freely determine whether or not to join a labor union. A truly free determination demands that the employees have access to all pertinent facts and points of view. By statutory directive, Congress has chosen the adversary system as the vehicle by which the employee may be assured of learning the information necessary to make a thoughtful choice. Section 8(c)[1] of the Act provides as follows:

> "The expressing of any views, argument or opinion, where the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

The only limitation upon the reciprocal rights of the employer to express his views and opinions and the employees' rights to receive and utilize such informa-

---

[1]The legislative policy is clear.

H.R. Rep. No. 243, 80th Cong., 1st Sess., p. 33: "[N]othing that anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own express terms, threatens force or economic reprisal."

H.R. Conf. Rep. No. 502, 80th Cong., 1st Sess., p. 45: "The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination."

tion is that the communication contains no threat of force or reprisal, or a promise of benefit. *NLRB v. United Steelworkers of America*, 357 U.S. 357 (1958); *NLRB v. Laars Engineers, Inc.*, 332 F.2d 664, 667 (C.A. 9, 1964).

The Board's brief before the Court below illustrated that there must be coercion before an employer will be found to have forsaken the Act's free speech guarantee. In the Board's brief there was no contention that the letters alone or in conjunction with the surrounding circumstances contained any threat of reprisal or force or promise of benefit. The counsel for the General Counsel conceded that neither the letters nor the surrounding circumstance contained any threat or promise and stated that it was the Board's position that these letters constituted a *per se* violation of the Act regardless of the absence of any threat or promise.

In adopting the *per se* position urged by the Board, the Court below violated its own prescription for encouraging vigorous debate. As stated in *NLRB v. TRW-Semiconductors, Inc.*, 385 F.2d 753 (C.A. 9, 1967):

> "While the trial examiner in the present case did generally cast his findings in terms of Section 8(c), we think that his findings were likewise based upon its conclusion that the statements could be considered coercive within the meaning of Section 8(a)(1). *The broad language of Section 8(a)(1) is not the test of whether election propaganda violates the Act. It must first be found that the challenged material contains a threat of force or reprisal or promise of benefit by the employer.*

"The guaranty of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available. It is an adversary proceeding and hardly impartial . . .

"Section 8(c) does not protect only those views, arguments or opinions that are correct, nor does it forbid them because they may be demonstrably incorrect. The remedy is for the union to answer them, not a cease and desist order." 385 F.2d at 759.

2. In the Absence of Coercion Advising Employees of Their Rights Is a Protected Activity as Are Employers' Accusations Aimed at Union Activities.

Whether the letters are characterized as educational tools or accusatorial indictments implying union wrongdoing, the law is clear that they are protected because they lack any threat or promise.

The appellate courts have uniformly held that not only is an employer protected in advising his employees of their rights but that, in the absence of threat or promise, such activities should be encouraged. *NLRB v. Hobart Brothers Co.*, 372 F.2d 203 (C.A.6, 1967); *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640 (C.A.2, 1952); *NLRB v. Armco Drainage & Metal Products*, 220 F.2d 573 (C.A. 6, 1955); *NLRB v. Blossom Products Corp.*, 121 F.2d 260 (C.A.3, 1941); *Midland Steel Products v. NLRB*, 113 F.2d 800 (C.A. 1, 1940).

Similarly, derogatory remarks and accusations are not unlawful if unaccompanied by threat or promise. *Linn v. Plant Guards Local 11*, 373 U.S. 53 (1966);

NLRB v. Fitzgerald Mills, 313 F.2d 260 (C.A.2, 1963); *NLRB v. Hobart Brothers Co.*, 372 F.2d 203 (C.A.6, 1967); *NLRB v. Brown-Brockmeyer Co.*, 143 F.2d 537 (C.A. 6, 1944); *NLRB v. Citizen News Co.*, 134 F.2d 962 (C.A.9, 1943).

For example, in *NLRB v. Hobart Brothers Co.*, 372 F.2d 203 (C.A.6, 1967), the company, by letter, accused the union of misrepresenting to the employees that when an authorization card was signed no one other than a union representative or a representative of the National Labor Relations Board would ever see this card. The company pointed out to the employees that in many instances the signed cards would be disclosed to the company. The court, in finding that the letter was protected by Section 8(c) of the Act, expressed its rationale as follows:

> "There is no oral testimony of any threats or reprisals. The trial examiner did not state what reprisals, if any, were threatened. It is understandable because none is contained in the letter." 372 F.2d at 204.

In the foregoing the communication was protected even though it was possible to draw some inference, reasonable or not, that the communication did contain a threat, because it indicated to the employees that the company would in fact have the opportunity to see who signed authorization cards. In this case, Petitioner created no such inference; rather, the Petitioner took every conceivable measure to see that it was not accorded such an opportunity, and this fact was made known to each employee.

B. The Holding of the Court Below Is in Conflict With All Decisions of the Courts of Appeals Which Have Considered the Issue of Similar Communications Including the Prior Decisions of the Court Below.

All the Courts of Appeals which have considered the question of the right of an employer to advise his employees of the right to withdraw authorization cards and provide means to do so have held the employer's actions to be permissible in the absence of coercion.

In *Federation of Union Representatives v. NLRB*, 339 F.2d 126 (C.A.2, 1964), the court found that the employer's solicitation of resignations from the union by means of a face-to-face conversation without threat of reprisal or promise of benefit was permissible.

In *NLRB v. Brookside Industries, Inc.*, 308 F.2d 224 (C.A.4, 1962), the employer's personnel director advised some employees of how to revoke their authorization cards. The court ruled that because there had been no unlawful threats or promises such activity was protected.

On three prior occasions, the Court below has considered the issue before this Court. In each case it has denied enforcement of the Board's order.

In *NLRB v. Sun Co. San Bernardino*, 215 F.2d 379 (C.A.9, 1954), the employer advised his employees that they could cancel authorization cards by writing to the union the court found that because the conduct contained no threat of reprisal or force or promise of benefit, there was no unfair labor practice, and the conduct was protected by Section 8(c) of the Act.

In *NLRB v. The Deutsch Company*, 408 F.2d 684 (C.A.9, 1969), the issue before the court was, as in

this case, the lawfulness of informing employees by letter of their right to withdraw authorization cards. The court held that the proscriptions of the Act were not intended to encompass trivial behavior when First Amendment rights were jeopardized.

In *S. H. Kress & Co. v. NLRB*, 317 F.2d 225 (C.A.9, 1963), employees reported to their employer that they did not believe that 30% of the employees had signed cards. Thereafter, the employer interviewed *individually* substantially all of the unit petitioned for by the union. The interviews were conducted in a closed storeroom area. Each employee was handed a mimeographed form which stated in the alternative that he had not signed for the union or that he had signed an authorization card and wanted it revoked and was asked to sign one or the other in front of management representatives. The order of the Board was set aside on the grounds that the employer's acts were noncoercive and should even be encouraged as an aid to employees in exercising their Section 7 rights.

C. The Board Conceded That the Letters Did Not Contain Any Threat of Reprisal or Force or Promise of Benefit and the Facts Demand Such a Concession.

The Board in the instant case conceded that there was no threat or promise; nonetheless, the Court below adopted the Board's position that the letters constituted a *per se* violation of the Act. An examination of the facts compels the conclusion that the rationale of the Court below, *i.e.*, a *per se* violation, was the only basis upon which the Court could find the letters unlawful.

Here the Petitioner sent its employees a letter which indicated that if they had been misinformed, coerced or intimidated into signing an authorization card or the authorization card was a forgery, they could revoke if by a particular method. The letters were not coercive and the Board makes no such contention.

The Petitioner was scrupulously careful in avoiding any threat or promise. In fact, rather than merely avoiding making any threat or promise, which is all that Section 8(c) requires in order to preserve free speech protection (see *Federation of Union Representatives v. NLRB, supra; NLRB v. Brookside Industries, Inc., supra; NLRB v. Sun Co. San Bernardino, supra*), the Petitioner made absolutely certain that no employee would feel intimidated or threatened in deciding whether to withdraw his card. The enclosed post card was addressed to the Board's Regional Office and simply stated the sender's desire to revoke his authorization card. The post card was not returnable to the Petitioner. The employees were not required to indicate to the Petitioner whether the post cards were sent, and the employees were not asked what they had chosen to do with the post cards. With this knowledge, the employees could exercise their rights freely and without fear because they knew that the Petitioner had no way of knowing what action, if any, the employee had taken with respect to the card; therefore, there was no possibility of coercion or interference with the right of the employees to exercise their freedom of choice.

There was no inducement, unlawful or otherwise. The Petitioner did not have a supervisor pass around the letters or cards; did not threaten to close the plant or discharge employees, or attempt to find out who

withdrew from the Union. To the contrary, the Petitioner did everything possible to maintain and preserve a clinically free and noncoercive atmosphere.

These actions of the Petitioner are therefore protected because the Petitioner had a right to noncoercively advise its employees of the action they could take in deciding to be or not to be a member of a union, and in providing the employees with a means of exercising their right. The letters and post cards allowed the Petitioner to test its ideas in the political marketplace while guaranteeing to the employees an opportunity to freely and effectively exercise their right to conveniently choose what action to take in the reflective atmosphere of their own home without fear of coercion.

D. The Court Below Is the First Court to Hold as a Matter of Law That a Communication Which May Result in Union Disaffiliation Is Unlawful.

1. The Court Below Erred in Holding the Letters Unlawful Because They Might Lead to an Employee Decision to Refuse Union Affiliation; Only if the Letters Contained a Threat or Promise Could They Have Been Found Unlawful and No Threat or Promise Existed.

The Court below held the sending of the letters to be a *per se* violation of the Act and sought to justify its holding by finding its decision "*completely consistent with the established rule that an employer cannot engage in conduct calculated to erode employee support for the union.*"

It is respectfully submitted that this is no rationale at all. It is undisputed that it is not the undermining of employees' support of the Union that is contrary to the law but the manner, method and approach used in doing so which makes a particular act violative: *i.e.*, an expression containing a threat of reprisal or force

or promise of benefit. It is undisputed that such activities as accusing the Union of trying to take away promised wage increases (*NLRB v. Gotham Industries*, 406 F.2d 1306 (C.A.1, 1969)); warning employees of union trickery and that unionization means strikes and loss of jobs (*NLRB v. Hawthorne Co.*, 404 F.2d 1205 (C.A.8, 1969)); informing employees that the Union had deprived the store of heat and had secreted purported authorization cards from impartial persons as a check of majority status (*NLRB v. J. L. Brandeis & Sons*, 145 F.2d 556 (C.A.8, 1944)); telling employees that signatures on authorization cards would not be kept secret (*NLRB v. Hobart Brothers Co.*, 372 F.2d 203 (C.A.6, 1967)), and all other communications attacking unionization are lawful if unaccompanied by threat or promise.

2. The Cases Relied Upon by the Court Below Show That the Letters Did Not Constitute a Per Se Violation of the Act and to Have Been Found Unlawful Would Have Had to Have Contained a Threat or Promise.

The very cases cited by the Court below conclusively demonstrate that an activity which may have the ultimate result of union disaffiliation is not a *per se* violation of the Act but to be unlawful must be accompanied by threat or promise. In *Amalgamated Clothing Workers of America v. NLRB*, 424 F.2d 818 (C.A. D.C., 1970), which is the principal case cited by the Court below, the company through its president and by leaflet stated that if the employees chose to remain loyal to the union and not to withdraw their authorization the company would discontinue its practice of soliciting marginal contracts and close the plant. Furthermore, the company required that each employee fill out and

sign a questionnaire which dealt with union organizing activities (requiring disclosure of which employees spoke about joining the union, what promises were made, etc.).

The secondary authority cited by the Court below again conclusively demonstrated the judiciary's uniform awareness of the distinction drawn between information accompanied by threat or promise and communications unaccompanied by these violative factors.

In citing *NLRB v. Price-Less Discount Foods, Inc.*, 405 F.2d 67 (C.A.6, 1968), the Court below failed to recognize the rationale for the decision which was as follows:

> "Although the letters contain language to the effect that the request for withdrawal of authorization was made of the employees' own free will and with no outside pressure, the evidence to the contrary is substantial. Solicitation, pressure and coercion are proved by convincing evidence." 405 F.2d at 71.

Similarly, in *Retail Clerks International Association v. NLRB*, 373 F.2d 655 (C.A.D.C., 1967), the employer had determined to institute a new benefits program throughout its chain of stores. As part of its decertification plan, the company, in the words of the Board, delivered speeches throughout the retail clerk's stores wherein "the speaker read a three-page introduction prior to explaining the benefits the employer wished to give the employees. The message conveyed by the introductory portion of the speech was that because of the presence of the union in these stores, the benefits *unfortunately* would not be given at this time.

E. The Decision of the Court Below Proscribes an Established Practice and Leaves No Practical Alternative Which Insures That Employees Will Be Informed of Their Rights.

The express decision of the Court below is to proscribe a traditional and widespread practice. Informing employees of their rights in regard to union affiliation has on a national scale long been used as an educational tool. The letter is generally chosen as the mode of communication rather than oral discussions because of the desire to insulate employees from any express or implied coercion.

If employers are absolutely curtailed from communicating with their employees, the only possible alternative will be either (1) the union informing the employees of their right to withdraw—an unlikely prospect—or (2) an employee going to the Board for an explanation of his rights—an option which assumes a great deal of employee sophistication, is much more inconvenient, runs against the employee's natural reluctance to become entwined with bureaucracy, and is generally a less satisfactory means of assuring that the views of employees will be reflected in political action. The upshot of the lower Court's ruling is to deny to employees knowledge of a precious right and to deprive them of the choice to join or not to join a union.

F. The Effect of the Decision of the Court Below Will Be to Chill All Employer Communications and to Substantially Still the Voice of Employers in the Theater of Union Organization Campaigns.

Perhaps more important are the implications of the rationale of the Court below which is expressed in two ways. First, the Court condemns the Petitioner's acts because *"the thrust of the company's mailing was to undermine employee support for the union."* Second, it labels the Petitioner's action unlawful because of the Court's opposition to *"all conduct calculated to erode employee support for the union."*

The legislative history of Section 8(c), the holdings of this Court, the Court below, and the other Circuit Courts all agree that the purpose of Section 8(c) is to protect and stimulate debate as to the merits of unionization. Section 8(c) imparts to labor-management relations the philosophical concept underlying the First Amendment that truth is the distillation of opposing views. In practice, substantially all of the communications between an employer and an employee in regard to unionization negatively portray the benefits of union affiliation.

As stated by this Court in *Linn v. Plant Guards Local 114*, 383 U.S. 53, 60 (1966):

> "We acknowledge that the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues affecting labor and management. And, as we stated in another context, cases involving speech are to be considered against the background of a profound . . . commitment to the precepts that debate . . . should be uninhibited.

> robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attack."

See also *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941) (same result on First Amendment grounds).

The effect of the decision of the Court below is to limit the protection afforded by Section 8(c) to pro-union sentiment only and minimally to chill any communication which could be interpreted as discouraging union support. The result will be to discourage communications which admittedly are intended to undermine union support, previously held to be lawful absent coercion. These include predictions of loss of work, harder work, and plant closure with unionization (*NLRB v. Golab Corp.*, 388 F.2d 921 (C.A.2, 1967)); conclusions that employees would lose rather than benefit from union representation (*NLRB v. Modern Plating Co.*, 358 F.2d 46 (C.A.7, 1966)); opinions that with unionization would come loss of customers and increasing costs (*P. R. Mallory & Co. v. NLRB*, 389 F.2d 704 (C.A.7, 1967)); indicating that the employer would deal hard with the union if the union was successful (*NLRB v. Wilson Lumber Co.*, 355 F.2d 426 (C.A.8, 1966)), and impressing upon employees that unionization would disrupt employer-employee relationships and subject employee job security to the whims of union leaders (*NLRB v. TRW-Semiconductors*, 385 F.2d 753 (C.A.9, 1967)).

The broad breadth of the holding below and the widespread effect of the challenged decision upon employer communications with employees are evidenced

by the Court's quoting verbatim the concluding two paragraphs of the letter which state as follows:

> "In my opinion the relationship as it presently exists at Deutsch is much better than the promises being made by these Union organizers which everyone knows will not be kept.
>
> "To those of you who support my position and continue to do so, and have not signed a card —many thanks."

The Court below has chosen these words for particular condemnation. Previously, it has always been assumed that such comments were the prototype of protected speech. By proscribing these statements, Section 8(c) has been judicially repealed and an employer has no guidance in deciding what he may tell his employees.

This type of employer "puffing" is the most innocuous sort of labor politicking and is standard management campaigning. Such statements have always been held lawful. See *NLRB v. Hawthorn Co.*, 404 F.2d 1205 (C.A.8, 1969) (warning employees of union trickery, unions have done nothing for employees and can very well destroy employees' jobs); *P. R. Mallory & Co. v. NLRB*, 389 F.2d 704 (C.A.7, 1967) (four letters *urging* employees to reject union, accusing union of lying to employees, predicting loss of jobs, union promise of protection false—pointing out how particular union had lost jobs for employees elsewhere); *NLRB v. Golub Corp., supra*, (accused union of false promises, predicting dire economic consequences, thanking employees for their support).

C. The Court Below Insists That an Employer Justify Its Right to Speak Before the Employer Will Be Afforded the Dispensation of Free Speech and Makes the Burden of Showing Justification an Impossible Task.

1. The Court Below Places the Burden Upon the Employer to Justify His Right to Speak.

The Court below ostensibly seeks to assuage the harshness of its rigid holding by indicating that while the absence of threat, promise or coercion will not protect anti-organizational statements, an employer may be able to justify its comments as a response to union coercion.

To so condition an employer's right of free speech is to shift from the traditional yardstick, *i.e.*, all speech is protected unless accompanied by coercion, which is the test under Section 8(c), to no speech is protected unless justified, the new test promulgated by the Court below. This approach fails to consider (1) that there is no unfair labor practice without threat, promise or coercion, and (2) that an employer may actively advise employees of their rights to disavow a union in the absence of justification if the communication is non-coercive.

2. The Burden of Justification Enunciated by the Court Below Can Never Be Satisfied.

The only evidence relevant to the issue of sufficient justification is what the employees told Hanly.[2] However, the Trial Examiner rejected this approach and

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[2] The Company offered the testimony of Hanly and the declarations of Hanly and the employees, executed soon after their discussions, for the limited purpose of what Hanly was told, but the Trial Examiner, without reason, rejected this offer.

required the Petitioner to produce the employees who spoke to Hanly. These employees were not asked what they told Hanly, but instead were asked what in fact had occurred between themselves and Union organizers. Basing his decision on this testimony, the Trial Examiner found the incidents to be trivial. The Court below, in adopting this approach, fails to consider that even if the employees exaggerated their accounts to Hanly, the Petitioner could only act upon what Hanly was told and the only finding on the issue was to *fully credit Hanly's testimony as to what he was told.*

Not only were the incidents in and of themselves sufficient to justify the Petitioner's action, but given the natural reluctance of employees to subject themselves as informers to even more aggravated coercion; the Petitioner could reasonably assume similar acts were being perpetrated by union organizers.

The standard imposed by the Court below withdraws from the employer the right to rely on the employees' version of facts. As this is the only source available to the employer, justification even under the new test of the Court below can never be employed to show that an employer was justified in exercising the right of free speech guaranteed to him under the First Amendment and Section 8(c) of the Act.

II. Despite the Prior Decisions of This Court and the Enactment of Section 8(c) of the Act, the Court Below Sanctions the Board's Reversion to Its Pre-1941 Position Which Was Condemned by This Court and Thought to Have Been Put to Rest by the Passage of Section 8(c) of the Act.

Prior to 1941, the Board required an employer to remain strictly neutral in labor-management relations and prohibited the employer from expressing his views as to the relative advantages and disadvantages of union affiliation.[3] By proscribing employer communications the Board denied to employees the right to receive and utilize information and opinions supplied by one of the parties most interested in an organizational drive. Commencing in 1941 with the case of *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941), this Court admonished that an employer's communication could not be the basis for an unfair labor practice if the communication was unaccompanied by threat or promise.

The legislative history of Section 8(c) conclusively evidences that Congress, in adopting the yardstick enunciated by this Court, agreed that the decisions of the Board were far too restrictive of the employer's right of free speech in the expression of his views on labor matters. By adding Section 8(c), Congress unequivocally declared that an employer's expression could no longer constitute an unfair labor practice unless the expression contained a threat or a promise.[4]

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[3] See Koretz, Employer Interference with Union Organization Versus Employer Free Speech, 29 Geo.Wash.L.Rev. 402-403.

[4] H.R. Rep. No. 245, 80th Cong., 1st Sess. 8 (1947): "Although the old Labor Board protests it does not limit free speech, it

Since the adoption of Section 8(c), this Court has not sought to clearly define the parameters of Section 8(c) or to describe an employer's rights to communicate with his employees under Section 8(c).* However, it is now apparent that there is a pressing need for this Court to consider the scope of Section 8(c). Since 1947, the significance of labor relations matters has grown tremendously. The scope of the Board's jurisdiction has grown until practically the country's entire work force has been made subject to the Act and the Board's jurisdiction. In 1970, over 3,300,000 workers were involved in work stoppages. The Board is faced with over 12,000 representation peti-

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is apparent from decisions of the Board itself that what persons say in the exercise of their right of free speech has been used against them. The bill provides that the new Board is prohibited from using as evidence against an employer, an employee, or a union any statement that by its own terms does not threaten force or economic reprisal." See also S. Rep. No. 105, 80th Cong., 1st Sess. 23-24 (1947): "The Board has placed a limited construction upon these decisions [Thomas v. Collins, 323 U.S. 516 (1945) and NLRB v. American Tube Bending Co., 134 F.2d 993 (1943)] by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated [Monumental Life Insurance, 69 N.L.R.B. 247 (1946)], or if the speech was made in the plant on working time [Clark Brothers, 70 N.L.R.B. 802 (1946)]. The Committee believes these decisions to be too restrictive, and, in this section (Sec. 8(c)), provides that if, under all the circumstances, there is neither an expressed or implied threat of reprisal, force, nor offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement."

*This Court has considered tangentially the issue of employer's free speech under Section 8(c) of the Act, but has not directly considered the issue. While a reading of the post 1947 cases raises an inference that this Court considers employer's speech protected in the absence of coercion, it is now evident that there is an important need for this Court to speak directly on this issue. See *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969); *N.L.R.B. v. Exchange Parts*, 375 U.S. 405 (1963); *N.L.R.B. v. United Steel Workers*, 357 U.S. 357 (1958).

tions and over 11,000 unfair labor practice charges annually. Close to 400 cases a year involving Board related activities are heard in the federal courts.

As the numbers have grown, there has been a natural gravitation to Board decision making. While this delegation is necessary because of the increased work load and need for expertise, it is crucial that this Court establish principles to insure that congressional intent will not be thwarted by Board administration.

The Board cannot under the guise of "delegation for the purposes of implementation" be allowed to thwart congressional intent as clearly expressed in Section 8(c) of the Act; in this case the Board has done so, with the approval of the Court below, by choosing to substitute its judgment as to the scope of employer free speech for the judgment of Congress.

It is obvious that despite the weight of Circuit Court authority to the contrary, the Board will continue to unlawfully proscribe all employer communication not only in the Ninth Circuit but nationwide for the Board feels compelled to follow *only* the direction of this Court. As stated in *Iowa Beef Packers*, 144 N.L.R.B. 615 (1963):

> "It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of the circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise. But it is not for a Trial Examiner to speculate as

> to what course the Board should follow where a circuit court has expressed disagreement with its views. On the contrary, it remains the Trial Examiner's duty to apply established Board precedent which the Board or the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act be achieved." 144 N.L.R.B. at 616.

The need for guidance from this Court is great in the area of free speech under Section 8(c) because, as this case exemplifies,[6] the Board has reverted to its pre-1941 position and has silenced the voice of employers in labor relations, despite the pre-1947 decisions of this Court and the 1947 Congressional directive that protects employer free speech in the absence of threat or promise. This case is ideal for the enunciation of guidelines because the factual issues are undisputed and the legal question clear: May the Board make unlawful an employer communication which does not contain any threat of reprisal or force or promise of benefit even though the communication may undermine the union's organizational efforts where Congress has declared the communication to be lawful.

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[6]For other examples see *Richman Brothers Co.*, 157 N.L.R.B. 1666 (1966) (the Board found employer in violation for telling employees "you people don't know what you are getting into with this union business."); *Foster Co.*, 168 N.L.R.B. 83 (1967) (Board found unlawful employer telling employees because of the union's activities he felt he had been "knifed in the back"); *Golub Corp.*, 159 N.L.R.B. 355 (1966) (Board found unlawful an employer noncoersively advising his employees as to his opinion of the results of unionization.)

Conclusion.

For all the foregoing reasons, it is respectfully submitted that the Writ issue.

Respectfully submitted,

LEON M. COOPER,

Attorney for The Deutsch Company, Metal Components Division, Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

U.S. Court of Appeals, Ninth Circuit (San Francisco).

National Labor Relations Board v. Deutsch Company, Metal Components Division, No. 26334, June 24, 1971.

LABOR MANAGEMENT RELATIONS ACT

—Interference— Interrogation of employees — No-solicitation rule — Union authorization cards 50.241 50.193 50.79

NLRB held warranted in finding that employer violated Section 8(a)(1) of LMRA, during union organizing campaign at the employer's plant, by coercively interrogating employees concerning their union activity, by invoking an invalid prohibition against union solicitation, and by soliciting employees to revoke their union authorization cards.

On application for enforcement of an NLRB order (72 LRRM 1248, 178 NLRB No. 95). Order enforced.

Jesse 1. Etelson (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Paul J. Spielberg, on brief), for petitioner.

Michael D. Koomer (Leon M. Cooper, Cooper, Wyatt, Tepper & Plant, on brief), Los Angeles, Calif., for respondent employer.

Aiken, Madden & Associates, San Marino, Calif., and J. E. Daniels, San Pedro, Calif., for union.

Before DUNIWAY and ELY, Circuit Judges, and BYRNE,* District Judge.

*Honorable William M. Byrne, United States District Judge, Los Angeles, California, sitting by designation.

Full Text of Opinion

BYRNE, District Judge: — The National Labor Relations Board ("the Board") found, in agreement with the Trial Examiner, that The Deutsch Company, Metal Components Division ("the Company"), violated Section 8(a)(1), of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1)[1] by coercively interrogating employees concerning their union activity at its Los Angeles plant, by invoking an invalid prohibition against union solicitation and by soliciting employees to revoke their union authorization cards. Pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e) this case is before the Court upon petition of the Board for enforcement of its order directing the Company (1) to cease and desist from engaging in the proscribed conduct which is the subject of its findings and (2) to post appropriate notices. The Board also seeks enforcement of its order setting aside the representation election of August 22, 1968, and directing the Regional Director to supervise a second election.

[INTERROGATION OF EMPLOYEES]

In March, 1968, the Union[2] began an organizing campaign at the Company's Los Angeles plant. Shortly thereafter, Peter Hanly, the Company's personnel director, engaged three employees in a conversation during their lunch break. According to Ray Rodriguez, a former em-

[1] Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), provides: "(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

[2] The Board reversed the Trial Examiner's finding that the Company further assisted the Union [illegible] by granting a wage increase on August 5, seventeen days before the representation election.

Industrial Union of Marine and Shipbuilders Workers of America, AFL-CIO.

ployee of the Company described by the Trial Examiner as "one of the leading adherents of the union among the employees," Hanly stated "that he heard there was going to be a union meeting and that he heard that the union organizers were giving $25.00" for each signed authorization card. Albert Matas, one of the employees to whom Hanly addressed his remarks, corroborated Rodriguez' account of this conversation.[4]

Hanly admitted inquiring of these employees about the place of the purported union meeting and whether they were being paid for submitting signed authorization cards, but maintained these inquiries were made in a jesting fashion. Because of the surrounding circumstances the Board found this conversation to be neither amusing nor lawful.

Viewed as an isolated incident, Hanly's innocuous questions, which apparently were directed at learning whether these employees supported the Union's organizational efforts, would not be considered violative of Section 8(a)(1) of the Act. To this effect the Courts have ruled on numerous occasions: NLRB v. Hotel Conquistador, Inc., 398 F.2d 430, 68 LRRM 2726 (9th Cir. 1968); Don the Beachcomer v. NLRB, 390 F.2d 344, 67 LRRM 2551 (9th Cir. 1968); Salinas Valley Broadcasting Corp. v. NLRB, 334 F.2d 604, 56 LRRM 2765 (9th Cir. 1964); Beaver Valley Canning Co. v. NLRB, 332 F.2d 429, 433, 56 LRRM 2371 (8th Cir. 1964); NRLB v. Larry Faul Oldsmobile Co., 316 F.2d 595, 597, 53 LRRM 2071 (7th Cir. 1963); Lincoln Bearing Co. v. NLRB, 311 F.2d 48, 51, 52 LRRM 2027 (6th Cir. 1962). In light of the,

[4]Danny Guirl, the third employee who was present during the course of this conversation did not testify.

evidence adduced at the hearing, we are persuaded that it would be imprudent to consider this case as another such occasion.

It is well settled that an employer's interrogation of employees constitutes an unfair labor practice under Section 8(a)(1) when it is associated with threats, be they express or implied, or promises, or "form(s) part of an overall pattern tending to restrain or coerce employees with regard to their protected activities." Amalgamated Meat Cutters, etc. Local No. 364 v. NLRB, 435 F.2d 668, 669, 76 LRRM 2138 (9th Cir. 1970); Don the Beachcomber v. NLRB, 390 F.2d 344, 67 LRRM 2551 (9th Cir. 1968); NLRB v. McCatron, 216 F.2d 212, 35 LRRM 2012 (9th Cir. 1954); cert.den. 348 U.S. 943, 35 LRRM 2461 (1955). Here, the conversation in question, which included a patently unlawful statement regarding the prohibition of union solicitation of Company property, must be viewed as another dimension in the panorama of unlawful antiunion activity which served as the Company's response to the organization campaign. In this context, it is clear that Hanly's interrogation comes within the well settled rule. Santa Fe Drilling Co. v. NLRB, 416 F.2d 725, 728, 72 LRRM 2399 (9th Cir. 1969); NLRB v. Little Rock Downtowner, Inc., 414 F.2d 1084, 1093, 72 LRRM 2044 (8th Cir. 1969); NLRB v. J. Taylor Mart, Inc., 407 F.2d 644, 646, 70 LRRM 2629 (7th Cir. 1969).

[NO-SOLICITATION RULE]

According to Rodriguez and Matas, during the conversation now in controversy, Hanly stated that Company policy prohibited any kind of solicitation on Company property. Hanly denied this account of the conversation claiming instead that he "told them it was against Company rules to distribute or to solicit, so-

licitation of any kind during working hours on Company premises." The Company's personnel director also asserted that he referred the employees to the booklet, "Employees Handbook, Deutsch", for further guidance as to the Company's rules regarding on premises solicitation.[3] The Trial Examiner "found that Hanly gave a mistakenly restrictive statement of the Company's no-solicitation rule" and thus concluded that the Company had invoked "an invalid no-solicitation rule," a violation of Section 8(a)(1) of the Act. The Board adopted the Trial Examiner's finding and conclusion.

The decision of the Board to resolve the conflicting testimony by crediting that of Rodriguez and Matas is binding on this Court. NLRB v. Holly Bra of Calif., Inc., 405 F.2d 870, 70 LRRM 2301 (9th Cir. 1969). Accordingly, it is without dispute that the all encompassing no-solicitation rule which Hanly promulgated is violative of Section 8(a)(1) of the Act. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 16 LRRM 620 (1945); NLRB v. Essex Wire Corp., 245 F.2d 589, 39 LRRM 2632 (9th Cir. 1957).

The Company has attempted to extricate itself from the morass of legal precedent by claiming that "the entire context surrounding Hanly's reference proves that the employees knew they were merely being advised of the old lawful rule." According to the Company, during the five month interval between Hanly's statement and the representation election the plant milieu was free of any reference to or enforcement of the no-solicitation

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[3]Hanly's reference is to the following rule found on page eighteen of the Company's booklet: "Solicitation: There will be no solicitation on Company property unless specific approval is granted by the Personnel Department." Because the Board made no finding with regard to this rule, the question of its validity is not now before the Court.

rule in controversy. Illustrative of this position is the acknowledgement by employee Ignacio Vasquez that he freely circulated union authorization cards during his non-working periods.

Save the testimony of Hanly, which the Board, as the *true* trier of fact, chose not to credit, the record is devoid of any evidence which supports the Company's contention that the three "employees knew they were being advised of the old lawful rule." Because the record fails to disclose any credible evidence which indicates that Hanly instilled in the employees the impression that he was merely reiterating the "old lawful rule," we must reject, what is in effect, the Company's invitation to sit as a super trier of fact. As already explained, a court of review may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." NLRB v. Walton Mfg. Co., 369 U.S. 404, 405, 49 LRRM 2962 (1962).

The evidence relating to employee Vasquez' circulation of union cards in no way contradicts our position. According to Vasquez, his sole effort on behalf of the union consisted of meeting requests for authorization cards made by twenty employees who, *unsolicited*, had approached him during non-working periods. The unassuming nature of Vasquez' activity strongly suggests that the Company was unaware of its occurrence. Indeed, the record's total silence on the matter of the Company's knowledge of such conduct lends considerable support to this inference. Absent evidence that the promulgation of the unlawful non-solicitation rule was nothing more than an inadvertent slip of the Company's tongue, we remain satisfied that the Board's find-

ing should not be disturbed. The Company's failure either to notify employees of its rescission of the rule, or to impart in them the belief that Hanley's statement was not an accurate reflection of its policy, created the impression that one acted at his peril if he engaged in lawful union activity. That such a labor practice is unfair as defined by the Act is well settled.[6] Jas. H. Matthews & Co. v. NLRB, 354 F.2d 432, 61 LRRM 2070 (8th Cir. 1965), cert. den. 384, U.S. 1002, 62 LRRM 2392 (1966). See, Food Store Employees Union, Local 347, Amalgamated Meat Cutters, etc. v. NLRB, 418 F.2d 1177, 71 LRRM 3004 (D.C. Cir. 1969); NLRB v. Walton Mfg. Co., 289 F.2d 177, 47 LRRM 2794 (5th Cir. 1961).

[UNION AUTHORIZATION CARDS]

On April 1, 1968, the Company mailed to its employees a letter informing them that a union authorization card could be revoked if it were signed due to misinformation, coercion or intimidation. The employees were also told that a forged authorization card was ground for revocation. In order to facilitate revocation, the Company enclosed a post card addressed to the Board which contained a statement which rescinded the union authorization card.

Approximately seven weeks later, May 20, 1968, Philip Holzman, the Company's president, sent a letter to the employees which again afforded them, by way of enclosed post cards, similar to those which were a part of the April 1 mailing, the opportunity to "withdraw"

[6] In light of our ruling, it is, of course unnecessary for us to take up the Board's "safety valve" argument that "even Hanly's version of the incident is credited," i.e., he told the employees soliciting was prohibited, "during working hours," the finding of a Section 8(a)(1) violation "is entitled to stand."

their authorization cards. The Company president concluded his letter with the following observation:

> "In my opinion the relationship as it presently exists at Deutsch is much better than the promises being made by these Union organizers which everyone knows will not be kept.
>
> "To those of you who support my position and continue to do so, and have not signed a card—many thanks."

The Board's finding that the Company's letter of May 20, 1968, violated Section 8(a)(1) is completely consistent with the established rule that an employer cannot engage in conduct calculated to erode employees support for the union. In Amalgamated Clothing Workers of America v. NLRB, 424 F.2d 818, 824, 73 LRRM 2323 (D.C.Cir. 1970), the Company's president spoke to his employees and "plainly solicited and urged (them) to repudiate the Union and provided the necessary information, *together with form letters* of resignation from the Union . . ." (Emphasis added). The court held that such conduct was in violation of Section 8(a)(1) of the Act. Similarly, in NLRB v. Priced-Less Discount Foods, Inc., 405 F.2d 67, 69, 70 LRRM 2007 (6th Cir. 1968), the Company was found to be in violation of Section 8(A((1) because it had solicited letters to its employees urging withdrawal from the union and because it had "assisted in the preparation and mailing of letters for the deliberate purpose of dissipating the union's strength and to frustrate its employees' right of self organization . . ." See Retail Clerks International Association v. NLRB, 373. F.2d 655, 64 LRRM 2108 (D.C. Cir. 1967), where the Company violated Section 8(a)(1) when it "encouraged and assisted its employees to repudiate the [Union] by filing de-certification petitions." (657).

In the instant case it is readily apparent that the thrust of the Company's mailing was to undermine employee support for the union. Given the state of the law, the Board's action of condemning this practice as a violation of Section 8(a)(1). is beyond reproach.

It must be noted that our decision to support the Board's finding was reached only after considering the Company's contention that the letter of May 20, 1968, was written in response to reports it had received that union adherents and organizers were engaged in acts of coercion and intimidation designed to win union acceptance. Our review of the records satisfies us that the Trial Examiner's rejection of the assertion is factually correct. Accordingly, we adopt his analysis as our own:

> "The Company presented the employees who testified to the so-called 'coercion and harassment' . . . The Trial Examiner must conclude that these incidents had no quality of coercion or intimidation and were of a most trivial nature. It would be hard to imagine an election in which there were nearly 300 participating employees, where there occurred less coercion and harassment than in this election. The worst incident of the so-called coercion occurred when two union adherents said to one employee 'You had better sign up now, or not go to work.' In another single incident a union adherent told an employee that if he didn't sign an authorization card, he might not have a job after the Union won . . . Here, no one was struck a blow, threatened with a blow or physical violence or threatened with serious reprisal for not signing a card. And indeed, any statement which borders upon coercion must be viewed as an isolated statement by one individual to another."

The Order of the Board shall be enforced in full.

APPENDIX B.

Order Denying Petition for Rehearing.

United States Court of Appeals, for the Ninth Circuit.

The Deutsch Company, Metal Components Division, Petitioner, vs. National Labor Relations Board, Respondent. No. 26,334.

Petition for rehearing denied.

October 8, 1971.

Duniway and Ely, Circuit Judges,
and Byrne, District Judge.

APPENDIX C.

Decision, Order, and Direction of Second Election.

United States of America, Before the National Labor Relations Board.

The Deutsch Company, Metal Components Division, and Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO. Case 21-CA-8064.

The Deutsch Company, Metal Components Division, Employer, and Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, Petitioner. Case 21-RC-10863.

On February 5, 1969, Trial Examiner David F. Doyle issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint. The Trial Examiner also found merit in certain objections to the election in Case 21-RC-10863 and recommended that the election be set aside and a new election be directed. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prej-

udicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner except as modified below.[1]

1. In adopting the Trial Examiner's finding that Respondent's letter of May 20, 1968, soliciting its employees to revoke their union authorization cards violated Section 8(a)(1), we do not rely on the rationale that it was unlawful because it was patently intended to create a false impression of coercion which would prejudice the Union's chances in the election. Rather, we conclude that because it solicited employees to revoke their authorization cards, the letter violates Section 8(a)(1) and warrants setting the election aside.

2. The Trial Examiner found that the wage increase of August 5, 1968, was intended to affect the results of the election, violated Section 8(a)(1), and constituted a basis for setting the election aside. In reaching this conclusion he relied on testimony of Philip Holzman, Respondent's president, that he had decided to

[1]The Court of Appeals for the Ninth Circuit recently denied enforcement of the Board's Order in another *Deutsch Co.* case (165 NLRB No. 5) on the ground that the violations were "so trivial that we conclude the purposes of the Act would not be served by enforcement of the Board's proposed order." *N.L.R.B. v. Deutsch Co.*, F.2d (C.A. 9), decided April 8, 1969, rehearing denied August 4, 1969. Although we respectfully disagree with the Court's conclusion that the unfair labor practices in the earlier case were "trivial," We are satisfied that continuation of these same unfair labor practices at another plant of the same company takes them completely out of the realm of trivia, and posting of an appropriate notice in order to effectuate the policies of the Act.
patently requires issuance of a cease and desist order and the

act on what was best for the company and not on ". . . whether or not this was considered the right thing to do because there was a union knocking at our gate. . . ." The Trial Examiner viewed this as an admission that Holzman was not concerned with whether it was the right thing to do ". . . with due regard given to the duties of employers and the rights of employees under the Act." We do not agree, as Holzman's statement is in fact a valid exposition of an employer's duty when faced with an organizing campaign. In such circumstances an employer is required to act as it would normally, absent the presence of the union. Had the Respondent withheld a wage increase it would have granted but for the union, it would have violated the Act.[2] In both 1966 and 1967 Respondent had increased wage rate ranges; the Respondent's employee handbook states that it is company policy to maintain wages as high as, or higher than, other companies in the industry, and Respondent's president testified that a decision had been made early in 1968 to watch trends in the industry and to maintain a competitive position. The record establishes that other employers in the aero-space industry in the same locality had just agreed, during contract negotiations, to grant substantial increases and the General Counsel has failed to prove by a preponderance of the evidence that this wage increase by the Respondent was motivated by union animus rather than by valid business considerations. Accordingly, we shall dismiss this allegation of the complaint and overrule the objection.

3. Apart from the unfair labor practices, it is clear, and we find, that the Respondent interfered with the

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[2] See, *McCormi - Longmeadow Stone Co.*, 158 NLRB 1237.

election by solicitng employee withdrawals from the Union. We note, however, that the Trial Examiner inadvertently failed to rule upon Respondent's letter of August 5, 1968, which the Regional Director for Region 21 in his Report on Objections in Case 21-RC-10863 found constituted conduct interfering with the results of the election. The Respondent excepted to this finding. Considering this letter in the context of the record as a whole, we conclude, in agreement with the Regional Director for Region 21, that the tone of the letter was calculated to convince employees that selection of the Union would be futile. In particular, we regard the following as virtually tantamount to an anticipatory refusal to bargain:

> *What can I gain* by voting for the union?
>
> The answer is *nothing.*
>
> The Union can get nothing for you that the company is not willing to give in the first place.

Accordingly, we find that Respondent's letter of August 5, 1968, constituted additional conduct warranting setting the election aside.

4. Finally, we take note of Respondent's contention that the Charging Party herein waived its right to object to the election on the basis of conduct which was the subject of an unfair labor practice proceeding pending before the Board at the time the Charging Party executed its request to proceed with the election on May 24, 1968. A "request to proceed" does not constitute a waiver of a union's right to urge post-petition unfair labor practices as conduct affecting the results of an election. *Lloyd A. Fry Roofing Co., Inc.*, 142 NLRB 673 at 681; *The Great Atlantic & Pacific Tea Company*, 101 NLRB 1118, at 1120-1121.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and orders that Respondent, The Deutsch Company, Metal Components Division, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as modified herein.

1. Delete from paragraph 1(a) of the Trial Examiner's Recommended Order that part which reads:

> ; granting an invalid wage increase to influence employees against assisting, joining or voting for the Union.

2. Delete from paragraph 1(b) of the Trial Examiner's Recommended Order that part which reads "in any other manner" and substitute therefor "In any like or related manner."

3. Delete from the Appendix attached to the Trial Examiner's Decision that part of the second indented paragraph which reads "in any manner" and substitute therefor "in any like or related manner."

4. Delete from the Appendix attached to the Trial Examiner's Decision that part of the first indented paragraph which reads:

> ; (4) granting an invalid wage increase to influence employees not to assist, join or vote for the above named Union.

IT IS FURTHER ORDERED that the election held on August 22, 1968, among the Respondent's employees be, and it hereby is, set aside, and that Case 21-RC-10863 be remanded to the Regional Director for Region 21 for the purposes of conducting a new election at such time as he deems that circumstances permit the free choice of a bargaining representative.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 21 shall direct and supervise the election, subject to National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been hired or reinstated before the election date, and

employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[3] Those eligible shall vote whether they desire to be represented for collective-bargaining purposes by Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO.

Dated, Washington, D.C. Sept. 24, 1969.

John H. Fanning, Member

Gerald A. Brown, Member

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

[Seal]

[3]In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 21 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

APPENDIX D.

Trial Examiner's Decision.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

The Deutsch Company, Metal Components Division, and Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO. Case No. 21-CA-8064.

The Deutsch Company, Metal Components Division, Employer, and Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, Petitioner. Case No. 21-RC-10863.

Brandt A. Wax, Esq., and *David G. Weber, Esq.*, for the General Counsel.

Cooper, Tepper & Plant, of Los Angeles, Calif., by *Leon M. Cooper, Esq.*, for the Deutsch Company, Respondent.

Before: *David F. Doyle*, Trial Examiner

Statement of the Case

This proceeding, with the parties represented by the counsel named above, was heard by the Trial Examiner in Los Angeles, California, on September 4-6, 1968, on complaint of the General Counsel and answer of the Respondent. The issues litigated were whether the Respondent had violated Section 8(a)(1) and (3) of the Act by certain conduct of its officers and supervisors.[1] The complaint in this proceeding was issued on

[1]In this decision, the Deutsch Company, Metal Components Division, is referred to as the Respondent or the Company; Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, as the Union; the National Labor Relations Board, as the Board; the General Counsel of the Board and his representatives at the hearing as the General Counsel; and the Labor Management Relations Act, as amended, as the Act.

June 11, and is based on a charge filed by an officer of the Union on April 24, and a first amended charge filed on May 6.[2] The complaint alleged in substance that the Company (1) had engaged in various acts of intimidation, restraint and coercion of its employees in violation of Section 8(a)(1) of the Act and (2) had discriminatorily transferred one employee, Ignacio Vasquez, because of his activity on behalf of the Union in violation of Section 8(a)(3) of the Act. In its duly filed answer, the Company denied the commission of any unfair labor practices.

On September 4, the proceeding came on regularly to be heard by the Trial Examiner. At the hearing all parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, to argue the issues orally upon the record and to file briefs and proposed findings.

At the time of the hearing, certain Objections to the Conduct of Election filed by the Union were pending before the Board in representation case 21-RC-10863. These objections arose from an election involving the parties and were of a nature similar to the above-mentioned unfair labor practices. On November 5, the Board remanded these objections to the Regional Director for disposition after hearing, and the Regional Director in turn referred the objections for hearing by the Trial Examiner. Thereafter, pursuant to appropriate motions and order the record of the hearing was reopened and such additional testimony was received as to the objections as counsel offered and the Trial Ex-

[2]All dates in this decision are in the year 1968 unless specified otherwise.

aminer deemed admissible. The reopened hearing was held on December 3 with the same counsel of record participating. Thereafter, all parties were afforded an opportunity to file additional briefs which have been considered.

Upon the entire record of the case and upon my observation of the witnesses, I make the following:

Findings of Fact

I. The Business Operations of the Company

Upon the pleadings and stipulations of the parties, it is found that the Company is a California corporation with a plant located in Los Angeles, California, where the Company engages in the manufacture and sale of parts and components in the aerospace industry. In the normal course and conduct of its operations, the Company annually sells and ships from its Los Angeles plant, goods valued in excess of $50,000, directly to points located outside the State of California. The Company also purchases annually and causes to be transported to its Los Angeles plant from points located outside the State of California material and supplies valued in excess of $50,000.

It is found, therefore, that the Company is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

At the hearing it was stipulated, and I find, that Philip E. Holzman, Peter D. (Pete) Hanly, and Howard (Pat) Whalen are agents of the Company and at all times relevant hereto were supervisors within the meaning of the Act.[3]

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[3]In the testimony the employees frequently referred to these supervisors as "Pete" and "Pat."

The complaint alleged that John Block, John Mancilla and Harry Saterbo are also agents of the Company and supervisors within the meaning of the Act but the Company denied the supervisory status of these individuals claiming that they are "leadmen" only. This is one of the issues to be decided in this proceeding, inasmuch as the General Counsel claims that these three men also engaged in conduct violative of Section 8(a)(1) of the Act.

II. The Labor Organization Involved

It is found upon the pleadings and a stipulation of the parties at the hearing that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The Issues

It is undisputed that in the spring of 1968, particularly in March, the Union began an organizing campaign in the Company's Los Angeles plant. The complaint alleged that in the course of following weeks the Company committed unfair labor practices as follows: (1) It discriminatorily transferred on April 1, employee Ignacio R. Vasquez to the day shift because of his activity on behalf of the Union; (2) by various supervisory officials threatened employees with the closing of the plant if the Union succeeded in its efforts or if the employees joined or supported the Union; (3) by various supervisory officials interrogated employees concerning their union affiliation and activities; (4) solicited employees to revoke their union authorization cards; (5) invoked an invalid no-solicitation rule to hamper the organizational efforts of the Union; (6) granted a wage increase to influence employees against

choosing to be represented by the Union and to influence the vote of employees in a Board-conducted election which was pending at the time; and (7) by various officials threatened employees with economic reprisals or detriments if they voted for the Union.

In its duly filed answer the Company generally denied the commission of unfair labor practices and as affirmative defenses stated that the job transfer effected by the Company was prompted by valid business considerations and not because of any union or protected activities on the part of any employee. As a second affirmative defense the Company alleged that any restriction imposed by the Company upon solicitation on behalf of the Union was motivated solely by considerations of security, safety, cleanliness and production efficiency, and not because any of the employees engaged in union activities. As a third affirmative defense the Company asserted that any communications between the Company and its employees were motivated to provide a fair, free and uncoerced judgment by the employees in regard to the choice of a bargaining representative in the election because the employees were subject to "harassment, threats, coercion and intimidation by the Union and its agents."

It should be noted that the Objections to the Conduct of Election referred to previously are in general a repetition of some of the allegations of unfair labor practices, and the Company's contentions on the objections are similar in content to its defenses presented in the unfair labor practice aspect of the case. A consideration of all the evidence and a resolution of the issues of unfair labor practices will for all practical purposes decide the issues presented by the objections.

As the reader must have noted there are a large number of issues thus presented. If this decision is to have clarity, the unfair labor practices of different kinds and types must be separated and classified under appropriate headings. This will be done, but the Trial Examiner desires that it be understood that in the ultimate decision as to unfair labor practice, the Trial Examiner has scrutinized the evidence in regard to that specific unfair labor practice and given due consideration to all of the evidence presented. Any compartmentalization which appears in this decision is only for the purpose of organizing the presentation of the evidence. Since there is a multiplicity of issues, reason requires that some be treated more shortly than others if this decision is to be kept within reasonable length. The Trial Examiner also wishes it understood that any disparity in length of treatment does not betoken that the specific issue received less than his full consideration.

The Alleged Discriminatory Discharge of Ignacio Vasquez

It is undisputed that Ignacio Vasquez and Luis Palacios are both employed by the Company as inspectors and both were employed on the night shift when the union organization campaign began early in March. It is undisputed that on a night in the first week of March, while both men were on duty, that they had an angry argument. From the testimony of all concerned, it is clear that Vasquez was a union adherent and Palacios had refused to sign an authorization card for the Union. According to both Vasquez and Palacios at the end of the shift they went to the parking lot and both men took off their shirts preparatory to engaging in a fistfight. Cooler heads among the crowd which gath-

ered finally prevailed and the men went their separate ways without any blows being struck, but without their difference being settled.

Vasquez called as a witness by the General Counsel testified that on the next shift after the near fight, he was told by his foreman Alverez to report to Pete Hanly, Personnel Director for the Company. When Vasquez talked to Hanly in his office, Hanly said that he had heard that Vasquez had a near fistfight with Palacios because Vasquez wanted to beat Palacios up, because Palacios had refused to sign a union card. Vasquez denied the truth of that statement. Then Hanly said that he had heard that Vasquez was a trouble-maker and that he was going to transfer Vasquez to the day shift. Then Hanly asked Vasquez what he thought about the Union and Vasquez told him that he was neither for or against it. Vasquez then told Hanly that he had engaged in a personal argument with Palacios off-and-on for over 6 months, and that the cause of the near fight was a "personal" matter between the two men.

Luis Palacios testified that some of the employees talked to him about the Union in the month of March. He would not sign a card for the Union and later he was told that Vasquez had said that he was a homosexual. Palacios went to Vasquez and asked Vasquez if he had said that he was a homosexual. Vasquez said that he had said it, and that it was true. Palacios said that he would wait for Vasquez outside the plant at quitting time and they would settle the matter by fighting. When they got outside at the end of their shift, Vasquez took off his shirt and said he was ready to fight. Palacios did likewise, but some of the employees pointed out that they were on company property and

the men argued with each other about whether they would be in trouble for fighting on company property. After some discussion, they left without fighting.

On the next day, Palacios told his foreman about the incident, saying that he didn't want to have any more trouble on the job with Vasquez; and that if he was going to have such trouble that he would look elsewhere for employment.

On the next night, he had a talk with Hanly, Director of Personnel, and told Hanly that he could not understand why Vasquez was making trouble for him. In the course of his testimony, Palacios said that Vasquez had *not* talked to him personally about the Union but he had heard Vasquez talking to other people about the Union.

Peter D. Hanly, Personnel Director for the Company, testified that the day after the Vasquez-Palacios incident, Alverez, one of the foremen, reported to him that Vasquez and Palacios had gotten into an argument on the night shift and that they had very nearly come to blows in the parking lot after the shift. He sent for Vasquez and informed Vasquez that he had heard about the altercation with Palacios. He asked Vasquez what it was about and Vasquez replied that it was a personal matter between him and Palacios. Hanly then told Vasquez that Palacios said that Vasquez had been bothering him because he would not sign a union card. Vasquez replied that there was no truth in that charge. Hanly then told Vasquez that he would have to separate the two men. He said that both were good inspectors and he didn't want to lose either one but he could not have any fights either on or after the shift and that under the circumstances he had decided to

transfer Vasquez to the day shift. Vasquez said that was all right with him, as he was going to request a transfer to the day shift anyway.

It is undisputed that among the employees the day shift is considered a more desirable job than the night shift, and because of that fact, the men on the night shift receive a differential of 10 cents per hour in pay.

Hanly said that Vasquez did not complain to him about his loss of the 10 cents differential in pay. However, in June, while Hanly was going through the plant, Vasquez asked Hanly for an opportunity to speak to him privately. Hanly arranged for Vasquez to come to his office. When the two men were alone, Vasquez told him that Albert Matas, one of the most vigorous of the union adherents, had been pestering him continuously to get him to sign a complaint against the Company for being transferred. Hanly told Vasquez to tell Matas "very firmly" that he did not want to sign any complaint. Hanly advised Vasquez that if he did that, he felt sure that Matas would leave Vasquez alone. Vasquez also told Hanly that at the union meetings the men drank an awful lot of beer and that on one night, when he had been drinking quite a bit, he had signed quite a few papers, of whose significance he was not aware.

Hanly testified further that he tried to effect some sort of amicable arrangement between the two men; Palacios was willing to forgive and forget, but Vasquez was adamant in his position. Since the name calling by Vasquez was the start of the incident and he seemed to be the more belligerent of the two, Hanly decided that it would be proper for him to transfer Vasquez rather than Palacios. Hanly stated that the transfer was

effected merely to keep peace between these two employees and for no other reason. As to this incident Hanly testified in a forthright and candid manner. I credit his testimony fully. Since both Palacios and Vasquez say the incident was "personal" in nature, started by name calling, I conclude that the transfer of Vasquez was not discriminatory. Therefore, this allegation of the complaint is dismissed because of insufficient evidence.

The Alleged Interrogation of Rodriguez by Holzman, President of the Company, and by Hanly and Whalen

Employee Ray Rodriguez, one of the leaders of the Union, testified that several supervisors questioned him about his union affiliation and talked to him about the Union.

Rodriguez testified that in the middle of March on one occasion Hanly told him that he had heard there was going to be a union meeting and asked Rodriguez if employees were being paid money for signing union cards. Rodriguez denied that anyone was being paid any money. Then Hanly told Rodriguez it was against company rules to solicit anything at any time on company property. Also, according to Rodriguez, in March, Whalen, one of the foremen, told him to report to Hanly's office. When he talked to Hanly, the latter questioned him about employee problems. Rodriguez told him that the employees were dissatisfied with the insurance plan which the Company had and with the amount of wages they were paid. Hanly replied there was nothing he could do about the money, but that the Company was working on an improvement in the insurance plan. According to Rodriguez, at this time

Hanly also told him that he knew how many cards the Union had gathered from the employees and that he (Hanly) knew that Rodriguez was one of the union organizers passing out union cards.

Rodriguez also testified that during the month of March, Holzman, President of the Company, summoned Rodriguez into his office and talked to him about the profit-sharing arrangement of the Company and Rodriguez that if the Union ever got in, Alex Deutsch, owner of the Company, would close down the plant.

Rodriguez also stated that around April 1, Foreman Whalen asked him if he had signed a union card to which Rodriguez replied in the affirmative.

Hanly, in the course of his testimony, stated that on an occasion during a lunch break in the month of March, he had walked over to Rodriguez and employee Matas and said to them, "Where is the union meeting?" They replied that there was no union meeting. Hanly then told them that he had been informed that they were getting $25 per union card that was signed, and asked if this was true. Matas replied that it was not true and if it were he would be able to retire at that time. Hanly testified that he had no intention of interrogating these employees in this conversation. He explained it was all said in a jesting, joking manner on both sides. Hanly testified that at this time he told the employees they could not solicit the signing of union authorization cards on company property, *during working time.*

Hanly also testified that in mid-March he asked Rodriguez what the major gripes in the plant were. Rodriguez said that the employees were dissatisified

with many things but particularly with the insurance plan and with the wages. Hanly told him that the Company was in the process of reviewing the insurance plan but that he couldn't do anything about the money at that time. Hanly denied that he said that he knew Rodriguez was an organizer for the Union or had been passing out cards. Hanly also denied that he asked Rodriguez how many cards he had.

Foreman Pat Whalen testified that Rodriguez worked in his department and that he talked to Rodriguez on many occasions in the course of the day. Whalen said that he didn't know anything about the Union's organizational activity or Rodriguez' part in any of it and that he never discussed the Union or authorization cards with Rodriguez at any time. Whalen also denied that he ever had any conversations with Matas in which Whalen brought up the subject of the Union. Whalen said that on one occasion he noticed that many of the machinists in his department were leaving their machines and gathering in little knots, talking. He told these men and Matas, who was the worst offender, to stay on their machines and he asked Matas why there was so much roaming around and talking. Matas said that a man had told him that he could go around and talk like that and he couldn't be fired for talking. Whalen asked Matas if this was supposed to be the rule, while he was supposed to be operating his machine and when the Company had some work for him to do. Matas said no, that he supposed under those circumstances he was supposed to be working. Whalen then told him to get working.

Philip E. Holzman, President of the Company, testified that in approximately mid-March he was informed that Rodriguez wished to talk to him in his office

about the profit-sharing arrangement of the Company and Rodriguez' retirement plans. He agreed to talk to Rodriguez. When the men met, Rodriguez said that he was thinking of leaving the Company and wanted to know how much he would receive under the plan as his separation pay. Holzman told Rodriguez that he had accumulated certain rights under the plan and pointed out to him that he would be best served under the plan by not leaving the Company until the month of August, when he would complete an additional stage in the plan and have a larger separation pay. Holzman explained that he thought that by August, Rodriguez might change his mind about leaving the Company. Holzman denied that in the course of this conversation there was any mention of the Union and Holzman denied that he ever said that Alex Deutsch would close the plant if the Union came in.

Rodriguez was one of the leading adherents of the Union among the employees and he impressed the Trial Examiner as a witness prone to slant or stretch his testimony in favor of the Union. In my judgment his testimony can be accepted only after careful scrutiny. On reviewing all this testimony, I find that Hanly violated Section 8(a)(1) of the Act by his "jesting" conversation with Rodriguez. Hanly admitted this questioning, and although it might have been "jesting" to Hanly, it was apparently considered nonjocular by Rodriguez. I do not accept Hanly's explanation of the innocence of this conversation.

It is also found that Hanly gave a mistaken restrictive statement of the Company's nonsolicitation rule, when he told Rodriguez that no solicitation coud be engaged in, on company property at any time.

I do not credit Rodriguez' testimony that Hanly told Rodriguez that he knew Rodriguez was an organizer of employees, passed out cards and that Hanley knew how many cards the Union had obtained. On these points, I credit Hanley's testimony and reject that of Rodriguez.

As to the Holzman-Rodriguez conversation in Holzman's office, I accept the testimony of Holzman. I also accept the testimony of Whalen and reject the testimony of Rodriguez. These findings are based entirely on the demeanor of the witnesses and the compatibility of the testimony of each with the totality of the evidence.

The Supervisory Status of Block, Mancilla and Saterbo, and Other Leadmen

The General Counsel contends that these three employees are supervisors under the Act and that some of their conduct amounts to violations of Sections 8(a)(1) of the Act. The Company contends that these men are leadmen, rank and file employees, and that the Company is not responsible for anything they may have said to fellow employees.

There is not much conflict in the evidence concerning the duties of these three individuals. It is undisputed that there are approximately nine departments in the plant, each of which is headed by a foreman who has that title. The number of employees under each foreman varies from 12 to 30 employees. In each department there is one or more senior employees with the job classification of "leadman" whose primary job is to assist in training new and less skilled employees. When these leadmen are not engaged in training, they themselves perform the standard operations of the department and they spend the majority of their

time in actual production work or in setting up machines or assisting others in the setting up of their machines. Only on occasions when the foreman is out of the department, do these men engage in directing other employees. It is undisputed that the only persons who can discipline employees, process grievances, or authorize changes in regular work hours are the foremen. On some occasions, the leadmen may refer matters concerning the competence or proficiency of employees to the foreman for the foreman's decision. The foremen regularly attend meetings of management personnel but the leadmen do not. Foremen are paid at the highest rate of pay in the department and the leadmen are paid a rate midway between that of the foremen and the rank and file employees. Foremen usually work one hour into the second shift while leadmen work only one-half hour into the second shift. This is done to give some continuity to the work in process.

In the course of his testimony, employee Matas testified that Saterbo had the power to hire, fire and otherwise affect other employees' tenure of employment, but this was directly contradicted by Hanly who stated that Saterbo had no such supervisory authority. Rodriguez testified that occasionally when Whalen was out of the department, Saterbo assigned work to the men and sometimes when Whalen was present Saterbo directed the men to various machines and shifted them about. Rodriguez said that occasionally he received a gate pass from Saterbo, if he wanted to leave the plant early. While it seems established that Saterbo did in fact on

occasion instruct employees as to which machine each was to work, it is equally clear that such "assignments" were made pursuant to a detailed written list which was supplied to Saterbo by Whalen, the foreman. Saterbo himself, in his testimony, denied that he had authority to discipline the men and this seems to be supported by the testimony of Matas and Rodriguez, who said that Saterbo usually told Whalen, about what the employee had done meriting correction, and Whalen later might correct the employee. Saterbo testified that he did not know if and when an employee was given a raise. In short, the principal duty of these men seems to be that they do work that is too difficult for the new or less skilled employees, and that they receive daily instructions as to the duties of themselves and the other men for the shift. From these lists they assign work to the men and report employee deficiencies or incompetence or misconduct to the foreman. Occasionally they are asked about the performance of employees and give their opinions of the men's competence, but their opinions, when asked may or may not be accepted by the foremen and higher management.

Upon all the evidence I find that the General Counsel has failed to prove by a preponderance of the evidence that these three employees, Block, Mancilla, and Saterbo, classified as "leadmen" by the Company and paid as such are supervisors as defined in the Act. It appears that they exercise no supervisory authority to hire, fire or discipline, or to recommend such action,

or to responsibly direct other employees. This finding extends to the other leadmen who voted by challenged ballot in the election of August 22.

The Filing of the Representation Petition and the Scheduled Election.

It is undisputed that on May 13, the Union filed a petition for certification of representative in Case No. 21-RC-10863. On July 25, the Board issued a Decision and Direction of Election which directed that an election by secret ballot be conducted by the Regional Office of the Board in a unit of employees described as follows:

> All production, maintenance, shipping, receiving, production control, and inspection employees and leadmen employed by the Employer at its 14800 South Figueroa Street, Los Angeles, California plant; excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

Pursuant to the Decision and Direction of Election aforesaid, the Regional Director, Region 21 (Los Angeles, California) on July 25, conducted an election by secret ballot in the representation proceeding.

The results of the election were as follows:

Approximate number of eligible voters	273
Void ballots	3
Votes cast for petitioner (Union)	54
Votes cast against participating labor organization	167
Valid votes counted	221
Challenged votes	17
Valid votes counted plus challenged ballots	238

On August 29, the Union filed timely objections to the election. The Regional Director conducted the usual investigation as to the objections and on September 26, filed his report on objections with the Board. Thereafter, on November 5, the Board issued an order directing that the representation proceeding including the Objections to Conduct of the Election be remanded to the Regional Director for consolidation with Case No. 21-CA-8064 in order that a resolution of the issues raised by the objections could be found by the Trial Examiner on the basis of sworn testimony in this proceeding.

The Wage Increases Given to Employees On July 31, Effective August 5

It is undisputed that on July 31, the Company by a letter to each employee announced that to continue the Company's policy "to pay wages equal to or better than wages for like or similar work in our industry and area," that "effective August 5, there will be a *general* increase in wages for *all* of *our hourly* paid factory employees."[4] The letter did not specify the amount of the raise for each employee, but employees Matas, Zagala, and Vasquez testified that effective August 5, in accordance with the letter, they received an increase in wages from $2.70 to $2.92 per hour. They also testified, while there had been instances of wages being raised in the past, there had been *no* prior instance when a wage increase was given *generally* to *all employees* at the *same time*. Also all former raises had been limited to 10 cents per hour.

The letter of July 31, over the signature of Philip E. Holzman, President of the Company, stated that the

[4]Emphasis supplied by Trial Examiner.

wage increase was given for the purpose of maintaining equality of wages with other companies in the aerospace industry. When Holzman was on the witness stand, he testified to the same effect, but when he was asked if he realized that at the time this raise was given, July 31, six days after the Decision and Direction of Election, he was aware of the pendency of the election, Holzman admitted that he was aware of that fact. The election was scheduled for August 22.

The Company's Letter to Employees Concerning the Revocation of Authorization Cards Given by Employees to the Union

It is likewise undisputed that on May 20, the Company sent to each of its employees the following letter:

To Deutsch MCD Employees:

The union organizers are still asking for cards and you may expect these organizers to step up the campaign and put pressure on you to sign cards.

Why is it that they are still trying to get cards?

One of the reasons is that they are trying to get enough cards so that they can force you to recognize them without an election and thus prevent you from deciding your future in a secret election.

Another reason is that they are not telling the truth in how many cards they really have and if they don't have enough, even the National Labor Relations Board will tell them to forget it.

Remember, you have the right to be free of fear, coercion or threat and our company will always protect these rights.

If anyone threatens or intimidates you, either at work or at your home, in any way, please report it to me or Pete Hanly and we will take the necessary action to protect your freedom.

For those of you who have signed a union authorization card because you either

1. were misinformed of your right not to sign a card if you so desired, or
2. were coerced and forced to sign a card, or
3. were intimidated or threatened with violence or loss of your job if the union got in, or
4. were told to sign a card to be a "right guy" or
5. believe someone else signed your name to a card,

you can withdraw your authorization to the union by signing the enclosed de-authorization card and mailing it to the National Labor Relations Board.

This card is being sent to you at your home so you can make your decision without fear, coercion, threat or promise of any kind. Discuss it with your family.

In my opinion the relationship as it presently exists at Deutsch is much better than the promises being made by these union organizers which everyone knows will not be kept.

To those of you who support my position and continue to do so, and have not signed a card—many thanks.

Yours very truly,

/s/ Philip E. Holzman
Philip E. Holzman
President

Attached to this letter was a card which reads as follows:

> Re: Deutsch Metal Components Division
>
> I hereby revoke my card authorizing the Shipbuilders Union to represent me.
>
> .....
>
> Employees Name
>
> .....
>
> Date

The card which the employee could fill out, if he so desired, was addressed to the National Labor Relations Board, Regional Office, Los Angeles, California.

Peter D. Hanly, Personnel Director of the Company, testified that for some weeks prior to May 20, he had received reports from employees that union adherents and organizers were coercing them into signing union authorization cards and in some cases threatening them with reprisals when the employees signified that they did not desire to join the Union. When he heard of these pressure tactics, Hanly conferred with the labor relations consultant for the Company who advised him that, if the employees were in fact being coerced, that he could send them a card allowing them to rescind their authorization cards by notifying the Regional Office in this manner. At that point the Trial Examiner ruled that he would not permit counsel for the Company to have Hanly testify to "reports" of incidents of so-called coercion, unless the employees allegedly coerced testified first-hand to each incident.

In support of Hanly's assertion of coercion, the Respondent offered the testimony of various employees.

One of these employees was Palacios, whose testimony has previously been recounted. Palacios had told Hanly that Vasquez has challenged him because he would not sign the union card.

Employee Aldo Montoto testified that Charles West, an officer of the Union, came to his home one evening in the middle of March after dark. Montoto said he lives with his mother, his sister and his grandmother. Montoto said that on this occasion West tried to persuade him to sign a card, but he refused to sign, principally because of the fact that at his request the Company had given his mother a job at a time when she needed one badly. On the following day, another employee by the name of Raoul Sans asked him when he was going to sign a card and said that eventually he would have to sign one, so he might as well do it then. Sans also said that if he didn't sign up then, that when the Union came in the plant Montoto wouldn't have a job.

Counsel for the Company offered to prove by Armando DeCastro, who runs a janitorial service, that some of his employees were mistaken for employees of the Company by union adherents and organizers and that one of them, Carlos Badilla by name, was harassed by some union adherents. This incident was reported to Hanly. Employee Rudy Resch told Hanly that on one occasion he had been approached by employee Diaz and another employee as he drove into the parking lot of the plant. Resch said that he was asked to sign a union authorization card and when he said, "no," he was told that he had better sign it. When he refused to sign on a second request, he was told by one of the men that, "He had better not show up for work." Hanly testified that as a result of having been informed of these incidents by these employees that he decided

that the Company should send out the letter of May 20 with the form to rescind authorization cards so that any employee so coerced or harassed could disclaim his authorization card.

At the resumed hearing on December 3, the attention of all parties was principally concerned with the objections to the conduct of election with main interest focused on the pay raise given unilaterally by the Company effective August 5. At the hearing, President Philip E. Holzman and Personnel Director Peter D. Hanly again testified. Counsel for the Company proffered in evidence through Holzman many pages of Los Angeles newspapers for late July and early August which had many articles about the labor negotiations between employees and management in the aerospace industry in the Los Angeles area. Counsel for the Company contended that these newspaper articles were read by Holzman and influenced him to make the decision to grant the pay raise. Counsel for the General Counsel objected that these newspaper pages were irrelevant to the issue. The Trial Examiner ruled that the newspaper articles were inadmissible, because they seemed to be too remote to the issue, and added nothing to Holzman's previous testimony that he was conversant with all the current negotiations in the aerospace industry and the general economic situation prevailing at the time, and that these influenced him to give the raise effective August 5. These newspaper exhibits were ordered by the Trial Examiner to be placed in a file of rejected exhibits. (Respondent's Exhibit No. 6 for identification—rejected.)

In the course of his testimony when recalled, Holzman testified that the wage increase at "the low end of the unskilled was 15 cents; the maximum of 35

cents an hour at the higher end of the highly skilled people." Holzman said that he had discussed this decision with other management officials for a long time and that he was aware of all the raises being granted through the various industries in the East "against the Government's guidelines." He pictured the Company as concerned that negotiations were going forward in the aerospace industry and he determined that "in order to maintain a competitive position because we were losing people and we were having difficulty getting skilled people", that they would have to be careful to maintain a competitive position as against the other companies in the aerospace industry. At the time the raise was granted there was talk of strikes at Lockheed and McDonald-Douglas. On direct examination he was asked, "Did the fact that the union had an organizing drive, that there was an election to take place on August 22, affect or determine your decision with regard to the wage increase?"

Holzman answered as follows:

A. No, it did not. A long time ago—and at that time I had already determined, as I said before, Mr. Cooper, that we were going to run this Company, because it was a company that had to be run, irrespective of any outside activities that occurred. We had to run the company on an economic competitive basis with others, and that is the basis on which I made my decision.

Q. Was the wage increase given in order to encourage the employees to vote against the union shop?

A. It was not.

Thereafter the Trial Examiner asked the following questions of Holzman:

Q. You were aware when the union started organizing, were you not?

A. Yes.

Q. And you have a Personnel Director at the company, Mr. Hanly, don't you?

A. That's right.

Q. And he advises you on labor matters, does he?

A. Yes.

Q. And did you discuss with him or anybody else the advisability of giving a raise in pay during the pendency of this union campaign, and when an election was coming up in a couple of weeks? Did you discuss that with him or anybody?

A. Not in those specific terms, no, sir. *I had agreed a long time with myself and with my conscience that I was to run this company on the basis of what I thought was best for the company, and I wasn't going to be concerned about whether or not this was considered the right thing to do because there was a union knocking at our gate or not.*

I am certain I was aware of the fact that the union was knocking at our gate. I knew that at the time I gave the raise that there was going to be an election. That didn't have any effect upon my decision.

I ran the company the way I thought it should be run, and that is what I did.

Q. Let me ask you this: Did you discuss the situation with Mr. Hanly about that?

A. I don't know whether I did in specific terms or not. He is present at most of my conversations where we talk about wages, so I would assume that the subject was discussed on that basis and I am sure that what I say to you now is what I said to him. I cannot operate on the theory that we are going to win or lose an election when we are concerned about the economic facts, going ahead, and running a business, making a profit.

Peter D. Hanly also testified at the resumed hearing. His testimony on labor relations at the company and granting of the pay raise is enlightening. Hanly testified as follows:

Q. (By Trial Examiner) Now, as I understand it, you and Mr. Holzman worked together on getting out this letter of May 20 with a card attached?

A. Uh-huh.

Q. Now, on this letter of April 1, with Mr. Holzman's signature, did you talk to him about that, too?

A. Mr. Holzman generally wrote the letters himself and gave them to me for any recommendations or changes that might be made in the letter, but that was the extent of it.

Q. Now, as Personnel Director, are you also in charge of labor relations for the company?

A. Normally, it might be so. Mr. Holzman has had that position ever since he has been with the Deutsch Company, which is some 30 years, and I am more a second man in the labor relations field to Mr. Holzman.

Q. So, in other words, he kind of runs the labor relations?

A. That's right, sir.

Q. But you are also engaged in that to some extent?

A. That is correct.

Q. You were the individual who kept track of all the union organizing campaign, did you not?

A. That's right.

Q. Did you keep track of the literature they distributed?

A. Yes, I did.

Q. Did you get copies of that?

A. Yes, I did.

Q. Did you discuss that with Mr. Holzman?

A. Yes, I did.

Q. And then you discussed with him the letters that the company was going to send out?

A. Yes, we did.

Q. Now, when it got around to this raise in pay, did you discuss that with Mr. Holzman?

A. *I was in on the discussions that took place regarding the raise.*

Q. Was anything said about that raise in pay being given at the time that an election was pending amongst the employees?

A. We had talked—about the possibility that there might have to be a raise. *This was sometime earlier in the year. But we didn't know what was going to happen.*

But as the union organization drive was going along, Mr. Holzman took the position and stated this position to myself to the plant superintendent and the general manager that he

was going to run the company as he always had and that he was not going to let the outside activities interfere with his normal direction of activities.

Q. Was there anyone there who counseled him and suggested at any time that he not give the raise in pay for a couple of more weeks, until the election was held among the employees?

A. I don't remember anybody counseling him on that, no.

Q. Was there any mention that it might be advisable to postpone the granting of the increase until after the election was held?

A. *There was a mention that the timing was not exactly good,* but Mr. Holzman referred us back to his original statement that outside activities are not going to interfere with our work situation.

The above narration of testimony is not an exhaustive exposition of all the testimony offered by the parties but is a summary of the highlights which presents the main contentions of the parties and affords a basis for review of the Trial Examiner's findings on the issues.

Concluding Findings

It has been found above that in certain particulars the Company violated Section 8(a)(1) of the Act by certain statements made by its supervisors. It has also been found that some of the allegations of the complaint were not proved by a preponderance of the evidence by the General Counsel and those allegations have been dismissed.

The remaining issues are principally concerned with (1) the letter of May 20 with its attachment of a form

whereby the employees could rescind their authorization card and (2) the letter of July 31 announcing a general pay increase effective August 5 during the pendency of the election.

As to the letter of May 20 with its rescission form, the Trial Examiner was impressed in the first instance by counsel for the Company's claim that the Union had practiced harassment and coercion against the employees in the procuring of authorization cards and in consequence the letter of May 20, with the rescission form, was a lawful method of protecting the employees in their freedom of choice in the election. Over the objection of the General Counsel, the Trial Examiner permitted counsel for the Company to present the testimony of employees who claimed to be the victims of such coercion or harassment, thinking that such coercion or harassment might justify this unusual letter with form attached. The Company presented the employees who testified to the so-called "coercion and harassment." Most of the testimony as to these incidents has been included in the narration of testimony above. The Trial Examiner must conclude that these incidents had no quality of coercion or intimidation and were of a most trivial nature. It would be hard to imagine an election in which there were nearly 300 participating employees, where there occurred less coercion and harassment than in this election. The worst incident of the so-called coercion occurred when two union adherents said to one employee "you had better sign up now; or not go to work." In another single incident a union adherent told an employee that if he didn't sign an authorization card, he might not have a job after the Union won. While such statements should not be made by one employee to another, it must be re-

membered that these workmen are not lawyers skilled in the niceties of labor law and in their enthusiasm, either for or against the union, employees will make such statements, and if isolated must be considered as unwanted incidents of the elective process. In this case, some of the alleged coercive quality of certain statements appears to have been in the mind of the listener, rather than in the words of the speaker. Here, no one was struck a blow, threatened with a blow or physical violence or threatened with serious reprisal for not signing a card. And indeed, any statement which borders upon coercion must be viewed as an isolated statement by one individual to another. In all the evidence there is not a scintilla of evidence that the Union initiated any pattern or course or plan of conduct to intimidate the employees.

Upon a consideration of all the evidence, I find that the Company assembled this trivia as an afterthought and now uses it as a pretext or excuse for sending its letter of May 20. Patently that letter was intended to create a false impression about coercion of employees which would prejudice the Union's chances in the pending election. The evidence discloses no justification for this action of the Company.

The very able counsel for the Company presents a case plausible on the surface for the increase of pay given to the employees, effective August 5. Holzman's testimony is to the effect that he wanted to remain competitive in paying wages with the other companies in the aerospace industry. I do not reject that statement, but I regard it as a half truth. From the testimony of Holtzman and Hanly, it is perfectly apparent, that they were aware of what the granting of a pay increase would do to the fairness of the election con-

ducted by the Board on August 22. Holzman's pious testimony that he sought only to adhere to his policy of equal wages does not ring true, for it is crystal clear that he and Hanly were fully aware that granting a substantial pay increase prior to the election would torpedo the union election campaign. It is not coincidence in my judgment that Holzman's decision to have equal pay, after months of study of wages in the industry, coincided with the Board's direction of an election among the employees. In my judgment, the secret of Holzman's decision is disclosed in his testimony when he said, "I had agreed a long time ago with myself and with my conscience that I was to run this company on the basis of what I thought was best for the company, and I wasn't going to be concerned about whether or not this was considered the *right thing* to do because there was a union knocking at our gate or not. . . ." Translated into everyday language, this statement means that he was not concerned with whether this was the "right thing" to do, with due regard given to the duties of employers and the rights of employees under the Act.

I find that the letters of May 20 and July 31 and the general wage increase effective August 5 constituted conduct in violation of Section 8(a)(1) of the Act and constitute valid objections to the conduct of election which rendered a fair election impossible.

It is recommended, therefore, that the Board by appropriate order shall set aside the results of election in Case No. 21-RC-10863.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in Section III above, occurring in connection with the operations of Respondent, described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and constitute unfair labor practices which tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1) of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the above findings of fact and upon the entire record in the case, the Trial Examiner makes the following:

Conclusions of Law

1. The Deutsch Company, Metal Components Division, herein called the Company or the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees concerning their union affiliation and activity and that of their fellow employees; by soliciting employees to revoke their union authorization cards; by invoking an invalid no-solicitation rule; by granting an invalid wage increase to in-

fluence their employees against assisting or joining or voting for the Union, the Company has violated Section 8(a)(1) of the Act.

4. By committing the unfair labor practices found above and by interfering in the election on August 22, 1968, in the manner described above, the Company has unlawfully interfered with the conduct of said election in Case No. 21-RC-10863.

5. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in the case, it is recommended that The Deutsch Company, Metal Components Division, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the Act by interrogating employees concerning their and their fellow employees' union activities; soliciting employees to revoke their authorization cards; invoking an invalid no-solicitation rule; granting an invalid wage increase to influence employees against assisting, joining or voting for the Union.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, or any other labor organization, to bargain collectively

through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Post at its plant at Los Angeles, California, copies of the notice attached hereto as "Appendix."[5] Copies of said notice to be furnished by the Regional Director for Region 21 shall, after being duly signed by the Company Representative, be posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Company shall take reasonable steps that such notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 21, in writing, within 20 days from the date of receipt of this Trial Examiner's Decision, what steps the Company has taken to comply herewith.[6]

It is further recommended that, unless the Company shall within 20 days from the date of receipt of this

[5]In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[6]In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

Trial Examiner's Decision notify said Regional Director, in writing, that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Company to take the action aforesaid.

Dated Feb. 5, 1969.

/s/ David F. Doyle
David F. Doyle
Trial Examiner

APPENDIX

Notice To All Employees

Pursuant To

The Recommended Order of a Trial Examiner of the National Labor Relations Board

and in order to effectuate the policies of the National Labor Relations Act

(as Amended)

we hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights under Section 7 of the Act by (1) interrogating employees concerning their own or their fellow employees union activities and affiliation; (2) soliciting employees to revoke their union authorizations given to Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO; (3) invoking an invalid no-solicitation rule; (4) granting an invalid wage increase to influence employees not to assist, join or vote for the above-named Union.

WE WILL NOT in any manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join, assist the labor organization named above, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining, or other mutual aid or protection, and to refrain from any or all such activities.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of the Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, or any other labor organization.

THE DEUTSCH COMPANY, METAL COMPONENTS DIVISION

.....
(Employer)

Dated.....

By.....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Eastern Columbia Building, 849 South Broadway, Los Angeles, California, 90014. Telephone Number 688-5229.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-854

THE DEUTSCH COMPANY, METAL COMPONENTS DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 445 F. 2d 902. The decision and order of the National Labor Relations Board (Pet. App. 11-34) are reported at 178 NLRB 516.

JURISDICTION

The decision of the court of appeals was entered on June 24, 1971, and Deutsch's petition for rehearing was denied on October 8, 1971 (Pet. App. 10). The

457-678—72

petition for a writ of certiorari was filed on December 31, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the employer violated Section 8(a)(1) of the National Labor Relations Act by soliciting employees to revoke authorization cards designating the union as their bargaining representative.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*), are set out in the petition at pp. 2-3.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In March 1968, the Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, began an organizational drive at the Company's Metal Components Division plant in Los Angeles (Pet. App. 21). Shortly thereafter the Company's personnel director, Peter Hanly, told three employees, during their lunch break, that he had heard there was going to be a union meeting. They replied that they did not know anything about it. Hanly then asked whether it was true that the Union was paying $25 to employees for signing authorization cards. Again the employees replied that they had no knowledge (Pet. App. 27-28; Tr. 30-32,

59–60, 218–219).[1] Finally, Hanly told the employees that Company rules prohibited all solicitations on Company property at any time (Pet. App. 27; Tr. 32, 60).

On May 20, the Company mailed letters to its employees stating that those who had signed union authorization cards could revoke them by signing and mailing the enclosure (GCX 2, 3; Pet. App. 36–38). The enclosure was a stamped postcard addressed to the Board, which read (*ibid.*):

> Re: Deutsch Metal Components Division
>
> I hereby revoke my card authorizing the Shipbuilders Union to represent me.
>
> _____
> (Employee's Name)
>
> _____
> (Date)

B. THE DIVISIONS BELOW

The Board found that Personnel Director Hanly's questioning regarding the union meeting was coercive and, therefore, that it violated Section 8(a)(1) of the Act. The Board found that the Company also violated Section 8(a)(1) by maintaining an excessively broad ban on union solicitation (Pet. App. 30, 27–28). Finally, the Board found that the Company's letter of May 20, 1968, violated Section 8(a)(1), in that it solicited the employees to revoke their union author-

[1] "Tr." refers to the stenographic transcript of testimony, and "GCX" to the exhibits introduced by the General Counsel, at the Board hearing.

ization cards (Pet. App. 12). The Board entered an appropriate remedial order (Pet. App. 15, 50-52).

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 1-9). The court held that (Pet. App. 8):

> The Board's finding that the Company's letter of May 20, 1968, violated Section 8(a)(1) is completely consistent with the established rule that an employer cannot engage in conduct calculated to erode employees' support for the union. * * *

ARGUMENT

The only issue raised in the petition—whether the Company could non-coercively "inform" its employees of their right to revoke their union authorization cards (Pet. 3)—is not presented on this record. The Board found, and the court of appeals agreed, that the Company's action—enclosing postcards, stamped and addressed to the Board, which the employee had only to sign and mail—constituted more than informing its employees of their rights. Rather, it in effect solicited the employees and furnished them with an instrument with which to nullify their selection of the Union. It is well settled that this type of employer

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The Board rejected the Company's explanation that its letter was in response to the Union's action in coercing employees to sign the cards. The Board found that (Pet. App. 46):

> these incidents [relied on by the Company] had no quality of coercion or intimidation and were of a most trivial nature. It would be hard to imagine an election in which there were nearly 300 participating employees, where there occurred less coercion and harassment than in this election. * * *

action violates Section 8(a)(1) of the Act. There is thus no occasion for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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See, e.g., National Labor Relations Board v. Birmingham Publishing Co., 362 F. 2d 2, 7 (C.A. 5); *Amalgamated Clothing Workers v. National Labor Relations Board (Winfield Mfg. Co.)*, 121 F. 2d 818, 821–825 (C.A. D.C.); *National Labor Relations Board v. J.C. Britton Co.*, 332 F. 2d 797, 798–799 (C.A. 9); *National Labor Relations Board v. Elias Bros. Big Boy, Inc.*, 327 F. 2d 421, 422 (C.A. 6).

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